United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

77-7163

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

LEO M. SHORE,

Plaintiff-Appellant,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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DOCKET NO. 77-7163

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RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

Plaintiff-appellant had moved on August 11, 1977 for permission to supplement his prior briefs to inform this

Court of the sole fact that this Court had affirmed the decision which plaintiff attempts to use in his mistaken effort to collaterally estop defendants-appellees in this action. While plaintiff's motion to supplement his prior briefs in a specifically limited respect was granted, plaintiff did not so limit his supplemental brief. Rather, the supplemental brief attempts to reemphasize plaintiff's mistaken reliance upon Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) -- an inapposite decision which did not deal with the question of the right of trial by jury or the fact that collateral estoppel may not be invoked to extinguish that right.

Plaintiff's supplemental brief is irrelevant to the issue before this Court. It in no respect whatsoever even mentions the Seventh Amendment right of trial by jury or the fact that the right of trial by jury exists in cases where, as here, a statutory claim for damages is asserted. Curtis v. Loether, 415 U.S. 189 (1974).

Thus, in Curtis, supra, the Supreme Court wrote:

> "The Seventh Amendment provides that '[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'
>
> Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been

settled that the right extends beyond the common-law forms of action recognized at that time."

* * *

"The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 192-94 (emphasis added)

The question then on this appeal is not the question as plaintiff conceives of it, but whether collateral estoppel may be applied to deprive defendants of their Seventh Amendment right to a trial by jury. The prior decision by which plaintiff here mistakenly seeks to deprive defendants of their jury trial right was rendered in an action to which plaintiff was a stranger and which was neither tried nor entitled to be tried to a jury. In such circumstances, as has been seen in the answering brief of defendants on this appeal, there can be no collateral estoppel to deprive defendants of their right to a jury trial. Preservation of that right is paramount to any policy of finality such as underlies collateral estoppel.

Respectfully submitted,

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